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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-01-227-54423 Office: VERMONT SERVICE CENTER Date: [illegible] 2014

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Mexican/Spanish. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is December 24, 1997. The beneficiary's salary as stated on the labor certification is $18.89 per hour or $39,291.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 9, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

Counsel responded to the RFE with a letter from an associate dated December 3, 2001 accompanied by additional evidence consisting of unaudited financial statements for the years 1997 through 2001 and copies of Form 1120 U.S. corporate income tax returns for the years 1997, 1998, 1999 and 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition.

On appeal, counsel submits no brief, but submits additional evidence. Most of the evidentiary documents submitted on appeal are additional copies of documents previously submitted for the record, but submitted for the first time on appeal are bank statements for an account of the petitioner for the months of August, September, November and December of 2001 and January and February of 2002 and a letter dated March 25, 2002 from the petitioner's manager.

Counsel states on appeal that the evidence establishes the petitioner's ability to pay the proffered wage at the time of filing.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the decision of the director. The evidence submitted for the first time on appeal will then be considered.

With regard to the financial statements submitted by the petitioner, the director determined that those documents appeared to be internally generated financial statements, created by and based on the representations of the petitioner's management. The director therefore ruled that those statements had little evidentiary weight. The director was correct in giving little weight to the financial statements. The statements submitted by the petitioner are unaudited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) quoted above requires audited financial statements to be submitted as evidence of a petitioner's ability to pay the proffered wage. The regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Concerning the Form 1120 U.S. corporate tax returns submitted by the petitioner, the director's decision discusses only the tax return for 1997, the year of the priority date. The director found that the taxable income figure for 1997 showed a loss of -$6,873.00. The director combined that figure with the figure for depreciation shown as $2,060.00 and the figure for inventory value shown as $7,500 and found that the combination of those three figures was insufficient to establish the petitioner's ability to pay the proffered wage.

The approach of the director in combining the figures for taxable income, depreciation and inventory was incorrect. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc., supra,* at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp, supra*, at 1054.

The Form 1120 U.S. corporate tax returns submitted by the petitioner show the following amounts on line 28, for taxable income before net operating loss deduction and special deductions: -$6,873 for 1997, $1037 for 1998, $7,753 for 1999, and $3,473 for 2000. Those figures are insufficient to establish the petitioner's ability to pay the proffered wage of $39,291.20 at the priority date or thereafter because they are all lesser amounts than the proffered wage.

Where a petitioner's taxable income is insufficient to establish the petitioner's ability to pay the proffered wage, CIS will look to the net current assets of the petitioner as an alternate basis to establish that fact. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In the instant case, calculations based on the current assets and current liabilities shown on the Schedule L's attached to the petitioner's tax returns yield the following amount for net current assets: -$1,884 for the end of 1997, -$1,087 for the end of 1998, $3,601 for the end of 1999, and $7,476 for the end of 2000. These figures are insufficient to establish the petitioner's ability to pay the proffered wage at the priority date or thereafter because they are all lesser amounts than the proffered wage.

The decision of the director to deny the petition on the ground of the failure of the petitioner to establish its ability to pay the proffered wage as of the priority date was therefore correct.

The AAO will next consider the evidence submitted for the first time on appeal. Counsel makes no claim that the bank statements from 2001 and 2002 were unavailable previously nor that the information in the March 25, 2002 letter from the petitioner's manager was unavailable previously, nor is any explanation offered for the failure to submit that evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

The petitioner was given reasonable notice by the regulation at 8 C.F.R. § 204.5(g)(2), quoted on page two above, by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted on that issue for the first time on appeal will not be considered for any purpose.

Moreover, even if the bank statements submitted for the first time on appeal were properly before the AAO as evidence, they would not be sufficient to overcome the decision of the director, since no evidence exists indicating that the amounts shown on the bank statements represent resources of the petitioner apart from the amounts shown on the petitioner's tax returns, which are analyzed above.

Concerning the letter dated March 25, 2002 from the petitioner's manager, the letter states that upon hiring the beneficiary the manager's wife will cease working to care for the two children of the manager and his wife, and that amounts paid for her salary would be available to pay the proffered wage to the beneficiary. The letter asserts that since the petition was filed on December 24, 1997, the year 1998 reflects more accurately the petitioner's financial status at the time of hiring than does the year 1997. The letter states that the officers were paid $40,296 in that year. The letter implies that the manager and his wife were the officers of the petitioner that year, but no documentary evidence confirms this fact. Moreover, the letter fails to state what portion of the compensation paid to officers was paid to the manager's wife. For this reason, even if the letter from the petitioner's manager was properly before the AAO as evidence, it would not be sufficient to establish the ability of the petitioner to pay the proffered wage as of the priority date. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.